NO. 33295

IN THE SUPREME COURT OF APPEALS FOR THE STATE OF WEST VIRGINIA

AT CHARLESTON

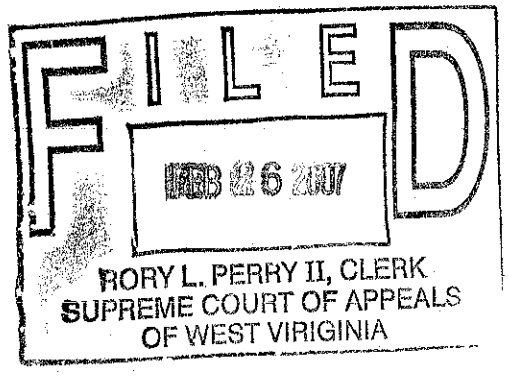
GRANDEOTTO, INC.,

Appellant,

vs.

CITY OF CLARKSBURG,

Appellee.



FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA

BRIEF ON APPEAL
ON BEHALF OF APPELLANT

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BRIEF OF APPELLANT GRANDEOTTO, INC., ON APPEAL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

I.

KIND OF PROCEEDINGS, NATURE OF RULING OF LOWER COURT

The appeal in No. 33302 was merged into the appeal of this case (No. 33295) by Order of the Supreme Court of Appeals entered on January 24, 2007.

Case No. 33295 was a civil action for specific performance and enforcement of right-of-way interests or other relief before the Circuit Court of Harrison County in Civil Action No.: 04-C-640-3. The appellant sought review of a final order entered on March 1, 2006 by the Circuit Court granting summary judgment to the appellee by finding that the appellant had no valid right-of-way interests. Your appellant had argued that since the appellee municipal government had represented through a real estate sales contract and a deed of conveyance, both prepared by the appellee municipal government, that the conveyance was made subject to the duly recorded right-of-way interests of the seller-appellant, the appellee was estopped from arguing that the said right-of-way interests were non-existent.

Case No. 33302 was a civil action arising from the torts of fraudulent misrepresentation and or negligent misrepresentation before the Honorable Circuit Court of Harrison County in Civil Action No.: 06-C-108-2. This case arises from facts developed and occurring before and during the course of the proceedings in Harrison County Civil Action No.: 04-C-640-3 assigned Supreme Court No. 33295. The appellant sought review of a final order entered on May 25, 2006 by the Circuit Court

dismissing all of the Appellant's claims upon the Appellee's Rule 12b Motion to Dismiss, the Court converting the same to a Motion For Summary Judgment and then granting it. The Circuit Court found, among other things, that the tort of negligent misrepresentation was not litigible in West Virginia or not sufficiently defined under current law despite the some eleven cases that refer to it.

This Brief on behalf on the appellant is timely submitted within the time frames of the Appellate Rules of the Supreme Court of Appeals.

II. STATEMENT OF THE CASE

Background

Your Appellant, Grandeotto, Inc. is a closely held corporation owned primarily by Bernard J. Folio and his children, holding and managing real estate in the City of Clarksburg and elsewhere throughout the State of West Virginia. In downtown Clarksburg, relevant commercial properties it owns are situated across West Main Street from the Harrison County Courthouse (including the former Rite Aid store building and the former Andrew & Ballard bookstore, coffeehouse, and restaurant), along South Third Street to West Pike Street (several commercial properties), commercial properties less than a block away further down West Main Street, and commercial properties along South Second Street. The property which is the topic of these cases is situated to the rear of its West Main Street properties and to the rear of its South Third Street properties, situated, if you will, within the right angle formed by those commercial properties and within a block from the other commercial properties.

The particular parcel of land owned by Grandeotto which has been at question in these matters is situated along Traders Avenue (an alley to the rear of the properties fronting West Main Street). It is a rectangular parcel bordered by Traders Avenue on the southerly end and West Pike Street on the northerly end. It consisted of a commercial building fronting Traders Avenue (occupied by Rocky's Shoe Store and a part of the Clarksburg Beauty Academy) and a seventy car parking lot fronting West Pike Street (that business owned and operated by Mr. Harold Riddle for over fourteen

years).[1] Locally, the parcel was commonly known as the former "Abruzzino property" and the building situated on it was commonly referred to as the "Rocky's Shoe Store Building."

Business in downtown Clarksburg has, in recent years, declined greatly. Many properties have become vacant as businesses closed their doors. Remaining businesses felt it crucial that additional parking be made available to the public to turn the tide of downtown economic decline.

In 2003, the City of Clarksburg received a public works grant from the State of West Virginia, West Virginia Economic Development Grant Committee, specifically for "Project No. 38 - City of Clarksburg - Parking Garage" and commonly referred to as the "West Pike Street Parking Project." The plan was to create a second parking garage in downtown Clarksburg and one of the original proposals submitted to obtain the grant contemplated the creation of approximately 515 (Five Hundred Fifteen) parking spaces. Approximately four years after the grant being awarded, the lot sits empty with not the first footer, brick, stone or block having been laid. In 2006, the City formally requested that the construction receiving the West Virginia Economic Development Grant Committee permit it to proceed without a building, that the City be permitted to place a parking lot on the site.[2] The City's request was denied. As far as can be discerned, the

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[1]According to the Affidavit of Ralph Pedersen, Architect for the project, attached to Appellee's Motion for Summary Judgment of record herein, the lot is 49 feet wide on its southerly side on Trader's Avenue, extends 182.5 feet to West Pike Street on its northerly end, where it fronts West Pike Street for 49 feet - a rectangle, in other words, with ends on Trader's Avenue and West Pike Street.

[2]It is often overlooked that there was already a seventy car parking lot on the site prior to the award of a $4.3M grant.

current plan involves a parking building which would provide approximately 115 parking spaces.[3]

Factual History

On June 8, 2004, Grandeotto conveyed to the City of Clarksburg that parcel of land and the commercial building situated thereon, said conveyance being made by deed recorded in the Office of the County Clerk of Harrison County, West Virginia as Instrument No. 200400060777 in Deed Book 1364 at page 350. The City of Clarksburg purchased that parcel of land and building for $220,000 (Two Hundred Twenty Thousand Dollars) with the grant monies obtained from the State of West Virginia, West Virginia Economic Development Grant Committee and specifically for the West Pike Street Parking Project. The total grant amount was $4,358,500 (Four Million Three Hundred Fifty-Eight Thousand Five Hundred Dollars), so that purchase of the Rocky's Shoe Store Building property was over 5% (Five Percent) of the total grant awarded.

Prior to the agreement to sell that property, the City of Clarksburg had represented to the officers, agents and representatives of the Appellant that the building was to be demolished and the land made part of the West Pike Street Parking Project. The first such representation was a letter from the City Attorney dated November 12, 2003. Since the officers of the Appellant corporation believed that demolishing that building and creating pedestrian access to and from a parking garage could help to maintain the value of their adjacent commercial properties and that the project as a whole could work as an impetus to resuscitate a dying downtown in general, Grandeotto agreed to sell the property upon the City's request that it do so.

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[3]That is, the project would result in a net gain to the commuity of approximately 45 parking spaces at $97,455.56 each (by total grant amount/parking spaces gained).

Significantly prior to selling the said property but after negotiations began, the Appellant carved out for itself two right-of-ways across the property providing for pedestrian and sewer access to its other commercial properties. This was done by the Appellant because its officers felt it necessary to insure that the City kept its word regarding demolishing the subject building to effect the pedestrian access. So, it is important to understand that the right-of-ways in question are intimately tied to the City's promises to demolish the building.

These right-of-way instruments were grants of right-of-way "for a sewer line and pedestrian travel for the benefit of the property located at 110-112 South Third Street Clarksburg, WV," (which are downtown commercial properties referenced above and owned by the Appellant), and the right-of-ways were of ten (10) feet and five (5) feet width, respectively, and "for the purpose of ingress and egress for any and all purposes," and to abut the rear of 110-112 South Third Street and run from Trader's Avenue to West Pike Street.[4]

The Rocky's Shoe Store Building extends the entire width of the lot (with no appreciable space between the building walls and the boundaries). In order for the Appellant to exercise its pedestrian right-of-ways, the building on the property would have to be demolished in whole or in part (fifteen feet of it). There is no way for a single pedestrian, let alone a group of pedestrians, to walk from West Pike Street to Traders Avenue across that property - there is no fifteen foot, ten foot, or even five foot

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[4]Each right-of-way agreement states that "[T]he right-of-way for pedestrian travel shall connect with Traders Alley and shall connect with Pike Street across said property...for the purpose of of ingress and egress for any and all purposes to the rear of the buiding of Grantee located at 110-112 South Third Street."

clearance for them. The parties, therefore, knew and contemplated that the only way to effectuate the said pedestrian right-of-ways was for the City to demolish the building as it represented orally and in writing that it would.

Clarksburg Attorney and President of the Exponent-Telegram newspaper, Cecil Jarvis, represented Grandeotto, Inc. regarding the creation of the first right-of-way, and further attended various meetings with officials of the appellee municipality prior to the sale of the property to the City, for the primary purpose of making sure that the appellee would honor the right-of-ways upon the property. Various City officials represented to Mr. Jarvis that the City would honor the right-of-ways of Grandeotto, Inc. and the deposition testimony of Cecil Jarvis was made a part of the record of both cases below.

Specific details of these right-of-ways was communicated to the City on several occasions by Mr. Jarvis. Mr. Jarvis testified that "I went to one or two meetings with Tom Vidovich [then City Manager] and a number of the other people from the City and Mr. Folio, and we talked about it and my point was just to make sure that everyone knew about the right-of-way so it wouldn't like pop up at the last minute and then it's a big hassle." Deposition of Cecil Jarvis, p. 9, l. 3-8. Also, "I do remember meeting with Vidovich a couple of times and just to make sure everyone knew about the right-of-way. It didn't seem to bother anybody." Id. at p. 10, l. 1-3.

After a sale price was reached, both the Contract and the subsequent Deed of conveyance were prepared by the Office of the City Attorney and both specifically acknowledge that the conveyance was made "subject to" a right-of-way instrument dated March 26, 2004 and recorded in the Office of the County Clerk of Harrison County, WV as Instrument No. 200400055836 in Deed Book 1361 at page 774, as well as a right-of-way instrument dated November 25, 2003 and recorded in Deed Book

1359 at page 432. The City, in its own construction of the sales agreement,[5] included the right-of-ways as follows:

> "The sale and conveyance of the Property shall be and is subject to the following:... b) To all exceptions, reservations, covenants, restrictions and easements contained in prior instruments now of record pertaining to the Property, including, without limiting the generality of the foregoing, those two (2) certain right-of-way agreements, one dated the 25th day of November, 2003, of record in the aforesaid Clerk's Office in Deed Book No. 1359, at page 432, and one dated the 26th day of March, 2004, of record in the aforesaid Clerk's Office in Deed Book No. 1361, at page 774." (Emphasis added.)

This language expressly declares the conveyance subject to all easements contained in prior instruments of record including those two right-of-ways, which are particularly referenced.

The Appellant's reliance upon the representations of the City regarding the right-of-way interests and demolishing the existing building were very important to the Appellant in multiple regards, including the fact that it needed to have parking and pedestrian access to its other commercial real estate fronting West Main Street and South Second Street. The Appellant justifiably relied upon its government's representations and that reliance was reasonable under all of the circumstances set forth in the pleadings and evidence below.

However, the City of Clarksburg, after expending over 5% (Five Percent)

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[5]The language in the Deed the City prepared is exactly the same also.

of the said public grant monies to acquire the above-referenced parcel from Grandeotto, Inc., decided not to use the said parcel or the building portion thereof for the parking project, or, alternatively, never intended to demolish the building irrespective of its representations,[6] refusing to honor the right-of-ways of Grandeotto, Inc., irrespective of the City's oral representations and without regard to its written representations in the November 12, 2003 letter, the Contract of Sale, and the Deed. Instead, the City took the place of Grandeotto as a landlord to the parking lot business and the business residents of the Rocky's Shoe Store Building, collecting rents, etc.

Procedural History

Grandeotto, Inc., was ultimately left with no choice but to file suit in the Circuit Court of Harrison County, Case No. 04-C-640-3, seeking specific enforcement of its right-of-way interests.[7] It must be understood that the City initially and throughout much of the proceedings in the lower court *expressly denied that it ever represented that it would demolish the building* to effect the right-of-way interest of the appellant. Then, an initial letter to the appellant from the City was found and introduced into the record, which clearly shows that the City represented explicitly to the appellant that the building would be demolished.

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[6]Another property not owned by the appellant but referenced in the record, was purchased by grant funds but not utilized in the project, which brings the grant funds expended but not used for the project to approximately 8% of the total grant.

[7]The appellant had also pleaded it its original complaint various other claims against the City, including fraud in the inducement, but all other such claims were voluntarily dismissed by appellant without prejudice well in advance of the scheduled trial date in order to streamline and simplify the issues for the jury.

During that case, the City also argued that Grandeotto, Inc. had no valid right-of-way interests, despite all of its prior representations.[8] On the eve of trial in that matter, the Circuit Court ruled that Grandeotto, Inc. had no valid right-of-way interests in regard to that property, finding that the language of the right-of-way agreements was ambiguous and that the doctrine of merger applied.

The Appellant pleaded throughout those proceedings that a municipality is a governmental entity and must be held to a higher standard of honesty and conduct than a profit-motivated business entity. The Appellant, shortly after the grant of summary judgment in Division III of the Circuit Court, filed a second action in the Circuit Court (assigned randomly to Division II) against the City for negligent and or fraudulent misrepresentation. In the Complaint initiating that second action below, the Appellant asserted each and every of the elements of both of those species of misrepresentation-based causes of action. There is no doubt that the City, through its officers and agents, at least negligently made actual false representations to the Appellant. One compelling item of such evidence brought to the attention of the lower court was a memorandum wherein it was recorded that Mayor Lopez instructed the project architect in April of 2004 that the property in question would not be "acquired or demolished" for the said public works project, this being months before the Appellee consummated the sale herein.[9] The appellant was not made aware of that conviction of the City regarding its

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[8] The City's defense of the doctrine of merger was brought *sua sponte* by the lower court at the pre-trial hearing held on October 21, 2005.

[9] Ralph Pedersen testified at his deposition regarding a meeting he attended with the Mayor of the City and others on April 26, 2004 at 4:00 p.m., and he produced a a contemporaneous memorandum he generated memorializing that meeting (Plaintiffs' Trial Exhibit No. 11). In that memorandum, Mr. Pedersen states that

property until well after litigation ensued (and therefore subsequent to the sale of the property and the representations of the City that the building would be demolished and Grandeotto's right-of-ways honored prior to the sale). Though the Appellant had preceded its original action with a Freedom of Information Act request for all documents in the City's possession regarding the West Pike Street Parking Project, it was not ever provided a copy of that memorandum from the project architect to the City, and only discovered it during the deposition testimony of the project architect who volunteered the information and provided the document. The memorandum was significant because it showed an intent on the part of the City to not demolish the building at the same time (during negotiations) that it was representing that it would be demolished and the right-of-way instruments honored.

On May 25, 2006 Division II of the Circuit Court entered an order with various findings, granting the City's motion to dismiss all claims (of misrepresentation - negligent and fraudulent), the Court converting the said motion to a summary judgment motion. The Circuit Court dismissed the claims without prejudice. That order made various findings of fact and conclusions of law, and made explicit references to the effect that some guidance from this High Court would be helpful regarding the tort of negligent misrepresentation. The Circuit Court in that regard correctly found that while

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"Lopez reported that the Doctor's Office Building on 4th Street and the building that holds the former Rocky's Shoe store on Traders Avenue at the rear of the Professional Building (3rd Street & Traders Ave.) **would not be acquired or demolished** and those parameters would need to be included in the project's design solution." Pg. 1, Paragraph 4 of Exhibit. (Emphasis added).

Subsequently, on June 8, 2004, the City purchased that building. Mayor Lopez, during his deposition, denied ever making such a statement to Mr. Pedersen. Lopez Deposition P. 23 L. 3.

it clearly appears that the tort of negligent misrepresentation exists in West Virginia, there is currently no delineation of its elements and it was therefore unable to proceed upon that claim.[10] As to the fraudulent misrepresentation cause of action alternatively pleaded, the Circuit Court found in that particular that, in light of Division III's ruling that no right-of-way interests existed, it could not allow the appellant to proceed thereon. The lower court made that finding despite the argument of the appellant below that the existence of the misrepresentation claims, regardless of which species, is not dependent upon the legal existence of the right-of-ways, but only upon the representations of the City to the appellant regarding the right-of-ways. It must be noted that the lower court correctly refused to the dismiss the claims upon the City's argument of a res judicata bar that Division III's order prohibited them. Division II correctly concluded that the allegations in the original action necessarily comprised only alleged conduct extant at the time of the filing of the original case, while the misrepresentation action before Division II included alleged conduct of the City subsequent to and during the course of the original litigation, and also that the claims before it were entirely separate claims.

So the question arises as to why the City purchased the subject real estate two months later, and a genuine issue of material fact arises as to the discrepancy in the testimony and documentation of Ralph Pedersen versus the testimony of Mayor Lopez. Other genuine issues of material fact concern whether or

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[10]Actually, there appears to be one element of the tort of negligent misrepresentation set forth in *Kidd v. Mull*, 215 W.Va. 151, 595 S.E.2d 308 (2004), which is discussed below herein, and involves a duty owed by the tortfeasor arising from the existence of a relationship between the parties.

not the appellant relied upon the representations of the City that the building would be demolished and the property used for the said public works project (see Deposition of Cecil Jarvis, P. 8 L. 8 through P. 11 L. 18), whether or not the appellant suffered damages as a result of the City's conduct and, if so, the nature and extent of the same, among other things.

The appellant sought relief from this High Court from the right-of-way rulings from Division III of the Circuit Court prior to filing the action for negligent or fraudulent misrepresentation. Then, following the dismissal of that second case, the appellant sought relief therefore from this Honorable Court.

III. ASSIGNMENTS OF ERROR

Enforcement of Right-Of-Way Interests

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED, BY APPLYING THE DOCTRINE OF MERGER TO EXTINGUISH RIGHT-OF-WAY INTERESTS, AND BY REFUSING TO APPLY THE DOCTRINE OF ESTOPPEL TO THE ARGUMENTS OF THE CITY THAT THE RIGHT-OF-WAYS IT HAD AGREED IN WRITING AND ORALLY TO BE SUBJECT TO DID NOT EXIST.

Negligent or Fraudulent Misrepresentation

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY GRANTING SUMMARY JUDGMENT UPON Appellee'S RULE 12B MOTION TO DISMISS BY FINDING THAT THE Appellant HAD NOT STATED A CLAIM FOR FRAUDULENT MISREPRESENTATION OR NEGLIGENT MISREPRESENTATION AND BY GOING FURTHER TO FIND THAT THE EVIDENCE DID NOT SUPPORT SUCH CLAIMS WHEN IT CLEARLY DID.

IV.
POINTS AND AUTHORITIES

Cases

Treatises

V.
DISCUSSION OF LAW

Enforcement of Right-of-Way Interests

THE LOWER COURT ERRED AND ABUSED ITS DISCRETION BY GRANTING SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXISTED, BY APPLYING THE DOCTRINE OF MERGER TO EXTINGUISH RIGHT-OF-WAY INTERESTS, AND BY REFUSING TO APPLY THE DOCTRINE OF ESTOPPEL TO THE ARGUMENTS OF THE CITY THAT THE RIGHT-OF-WAYS IT HAD AGREED IN WRITING AND ORALLY TO BE SUBJECT TO DID NOT EXIST.

The lower court granted summary judgment against the appellant declaring that the appellant had no valid right-of-way interests on the basis of amibiguity in the right-of-way instruments and on the basis of the doctrine of merger. Each must be considered in turn.

A. "Ambiguity" in the Easements

Regarding "the ambiguity" of the right-of-way instruments, the appellant respectfully asserts that the instruments, while not containing "metes and bounds" descriptions, more than adequately describe the right-of-way interests such than any "reasonable person" could determine the route of the right-of-ways through the property without resort to any other source and, further, that to declare those duly recorded right-of-way descriptions insufficient as a matter of law is paramount to destroying many less particularized instruments in existence and routinely upheld in the courts of this State.

Each instrument in this case[11] states that:

1) the grant is for the purpose of "a sewer line and pedestrian travel for the benefit of the property located at 110-112 Souh Third Street";

2) that the grant shall "be a covenant running with the land";

3) that the grant shall be "for a sewer line and for pedestrian ingress and egress to the back of the property owned by Grandeotto, Inc. being 110-112 South Third Street, Clarksburg, Harrison County, West Virginia";

4) that the sewer line grant "shall go from the back of the property of Grandeotto, Inc. at 110-112 South Third Street to be located in the discretion of said Grantee to Pike Street over a reasonable route as necessary to connect to the sewer system at such location as determined by the Grantee";

5) that "[t]he right-of-way for pedestrian travel shall connect with Traders Alley and shall connect with Pike Street across said property purchased from Abbruzino, et al, and shall be 10 feet wide[12] for the purpose of ingress and egress for any and all purposes to the rear of the building of Grantee located at 110-112 South Third Street."

The pedestrian right-of-ways are, therefore, connecting the parallel streets of Pike Street and Traders Alley[13] connecting to the rear of the 110-112 South Third Street building. Since South Third Street forms right perpendicular angles with Pike Street

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[11]The instruments are attached as exhibits to various documents in the record, including the deposition transcript of Cecil Jarvis as Exhibits No. 1 and 2, and their language is likewise particularly quoted in various pleadings throughout.

[12]The only difference in the language of the instruments is that the November 25, 2003 instrument says "5 feet wide," while the March 26, 2004 instrument says "10 feet wide."

[13]Also known as "Traders Avenue."

and Traders Alley on the easterly side of the subject property conveyed, there is no room for ambiguity here. It was, respectfully, an abuse of discretion for the lower court to find ambiguity in regard to these right-of-way instruments. Applying the pertinent portion of High Court's analysis In *Belcher v. Powers*, 212 W.Va. 418; 573 S.E.2d 12 (2002), the instruments at bar clearly should not fail for ambiguity as a matter of law. Syl. Pt. 3 of that decision states that "A deed granting ... a ... right of way must contain on its face a description of the land in itself certain, so as to be identified, or, if not in itself so certain, it must give such description as, with the aid of evidence outside the deed, not contradicting it, will identify and locate the land ...." *citing* Syl. Pt. 1, in part, *Hoard v. Huntington & B.S.R. Co.*, 59 W.Va. 91, 53 S.E. 278 (1906). There is no other geography in this State which could be interpreted to be ambiguous to the description in these instruments. There is no room for ambiguity when the parallel Clarksburg city streets of Traders Alley and Pike Street abut to the rear of the property of the perpendicular South Third Street. Far from ambiguous, it is certain. The *Belcher* case also reminds us that much consideration is to be given to the intention of the grantor, which, from these facts, is also obvious.

B. Application of the Doctrine of Merger

The appellant's analysis and argument in regard to the lower court's finding of merger invalidating the right-of-way interests of the appellant is essentially that, regardless of the application or non-application of the doctrine of merger, the City, through its conduct, should be held to being "subject to" the right-of-way instruments it said it would be subject to in the Contract of Sale and the Deed of conveyance it drafted. The question of law regarding the application, if any, of the doctrine of merger was brought

sua sponte by the lower court at the pre-trial hearing held on October 21, 2005. At that time and never before it, the City began stating that a merger of interests occurred.

While there exists a doctrine of law which supports the argument that the right-of-ways of Grandeotto, Inc. merged into Grandeotto's fee interest prior to its conveyance of the property to the City (*Easements,* M.J.2d, Creation § 21), that issue is not dispositive of the matter because there is no doubt that whether or not such is the case, the said right-of-ways of Grandeotto, Inc. should have been held intact and valid in every respect by other well-established doctrines of law surrounding the methods by which an easement may be created, including grant or reservation, and estoppel.

Methods of Creating an Easement

An easement is the right to utilize the land of another. See *Black's Law Dictionary*, 6th Ed., p. 509. A right-of-way is a species of easement which generally involves passage over the land. *Id.* p. 1326.

"There are a number of ways an easement can be created. An easement may be created by express grant or reservation, by implication, by estoppel or by prescription." *Easements,* M.J.2d, Creation § 7, see also *Paden City v. Felton*, 136 W. Va. 127, 66 S.E.2d 280 (1951).

As set forth above-herein, the Appellant had a legitimate business purpose in creating the right-of-ways, i.e. to insure pedestrian and other access to the other properties it owns as stated in the right-of-way instruments themselves. This interest was preserved through lawfully constructed and duly recorded right-of-ways. Knowledge of these right-of-ways was communicated to the City on several occasions by Grandeotto's counsel for the transaction, Cecil Jarvis as stated above-herein. The

City then, in its own construction of the sales agreement, included the right-of-ways as follows:

> "The sale and conveyance of the Property shall be and is subject to the following:... b) To all exceptions, reservations, covenants, restrictions and easements contained in prior instruments now of record pertaining to the Property, including, without limiting the generality of the foregoing, those two (2) certain right-of-way agreements, one dated the 25th day of November, 2003, of record in the aforesaid Clerk's Office in Deed Book No. 1359, at page 432, and one dated the 26th day of March, 2004, of record in the aforesaid Clerk's Office in Deed Book No. 1361, at page 774." Exhibit D p. 2, ¶ 1. b).

Again, the same language is included in the Deed of conveyance and, obviously, this language expressly declares the conveyance subject to <u>all</u> easements contained in prior instruments of record <u>including</u> those two right-of-ways, which are particularly referenced. For clarity, the language does not generally exclude these right-of-way instruments by any limiting language such as "legally enforceable instruments of record" or "valid instruments of record" or "instruments of record which are not subsumed by the doctrine of merger" or the like - just "prior instruments now of record" (which both right-of-way instruments at bar were) - but the recitation even goes on to particularly referencing the two instruments at bar stating that the conveyance would be "subject to" them. **In the absence of the right-of-ways surviving a merger into the fee estate, *arguendo* then, the City made what can only be described as an express grant of the right-of-ways through the sale instrument.** And, then, the City ratified the grant to Grandeotto, Inc. by memorializing it (reissuing it, re-granting it - however it should be

expressed) in the Deed of conveyance it prepared with the exact same language. Since both grants cited instruments of record with particularity, those grants are to be regarded as if the complete language of the right-of-ways were fully set forth in each instrument and should be regarded as such.

"An easement may be acquired by express grant and may also be created by covenant or agreement." *Easements,* M.J.2d, Creation, § 7; *Cottrell v. Numberger*, 131 W. Va. 391, 47 S.E.2d 454 (1948); *Post v. Bailey*, 110 W. Va. 504, 159 S.E. 524 (1931). These two instruments, i.e. the Contract of Sale and the Deed of conveyance, then, are irrefutable evidence of covenant, agreement, and express grant creating or re-creating the easements in question, irrespective of the doctrine of merger.

Further, the doctrine of estoppel applies in several ways here. First, "[e]asements are sometimes created by estoppel." *Easements,* M.J.2d, Creation, § 16; *Paden City v. Felton*, 136 W. Va. 127, 66 S.E.2d 280 (1951). Second, the allegations of the complaint and the evidence adduced in discovery factually support the doctrine that "[a] showing of inducement, reliance, user and injury may establish an implied easement through the doctrine of estoppel." Id. (M.J.2d); *Jones v. Beavers*, 221 Va. 214, 269 S.E.2d 775 (1980). Third, and perhaps most importantly, is the application of the usual meaning of estoppel, i.e., that the City is now estopped from claiming that no right-of-ways exist after it has acknowledged them so explicitly throughout the history of this matter in legal instruments and oral representations. The Fourth Circuit Court of Appeals has reasoned that the doctrine of equitable estoppel is a bar to the assertion of a statute of frauds' defense." *Lance J. Marchiafava, Inc. v. Haft*, 777 F.2d 942 (4th Cir. 1985). If it is a bar to a strong, central doctrine of jurisprudence which came to us through the common law and was implemented by statute, then it must be a bar to a

weaker doctrine which has come to us from the common law which is not implemented in statute.

The conduct of the City of Clarksburg, a government entity, in this matter must be considered and the lower court, with due respect, never considered that conduct and found that no right-of-ways exist in the face of all of the evidence that the City acknowledged / ratified / created said right-of-ways in multiple ways, there having been a "meeting of the minds" regarding the validity of the same. The documentary evidence and the testimony cited all together demonstrate that the City knew of and ratified the existence of the right-of-ways. The right-of-ways constituted encumbrances on the property, as stated by Cecil Jarvis in his deposition (P. 8, L. 20). Therefore, the City bought property subject to encumbrances, with certain knowledge of those encumbrances. It is the same as if the City would have bought real estate subject to the encumbrance of a first deed of trust lien which diminished the value of the property substantially. See, generally, Syl. Pt. 4 of *Belcher.*

The appellant further asserts that the City, being a governmental body, has an even higher standard of conduct than a commercial corporation and a heightened duty of fair dealing.

> "There is an even more compelling reason why the State should address the grievances of its employees: the concept of fair dealing between people. In the private sector, the government created the NLRA in an attempt to remove the coercive bargaining tactics used by employers in their pursuit of lucre. In so doing, it recognized the evils of a system based on the "take-it-or-leave it" philosophy of management-labor relations. As part of the remedy, certain rules were laid down which have the effect of balancing the parties' positions

and encouraging a free exchange between management and labor. To say that the State is exempt from fair dealing is to allow the State to practice labor tactics as unfair as the type of tactics Congress outlawed under the NLRA. The State should be an example of highest order in regard to dealing fairly with Workers." *City of Fairmont v. Retail, Wholesale, and Department Store Union, AFL-CIO, et al*, 283 S.E.2d 589, 166 W.Va. 1 (1980); see also,

"1. "If a special relationship exists between a local governmental entity and an individual which gives rise to a duty to such individual, and the duty is breached causing injuries, then a suit may be maintained against such entity." Syl. pt. 3, Benson v. Kutsch, 380 S.E.2d 36 (1989).

2. To establish that a special relationship exists between a local governmental entity and an individual, which is the basis for a special duty of care owed to such individual, the following elements must be shown: (1) an assumption by the local governmental entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local governmental entity's agents that inaction could lead to harm; (3) some form of direct contact between the local governmental entity's agents and the injured party; and (4) that party's justifiable reliance on the local governmental entity's affirmative undertaking.

3. The question of whether a special duty arises to protect an individual from a local governmental entity's negligence in the performance of a nondiscretionary governmental function is ordinarily a question of fact for the trier of the facts." Syl. Pts. 1-3, *Wolfe v. City of Wheeling*, 387 S.E.2d 307, 182 W.Va. 253 (1989).

The City of Clarksburg has a special duty of heightened care to be honest and forthright in its business dealings with its citizens. It breached that duty herein.

The lower court erred and abused its discretion by extinguishing significant right-of-way interests which existed between these parties and its final order should be set aside as in legal and equitable error.

Negligent or Fraudulent Misrepresentation

THE HONORABLE LOWER COURT ERRED, ABUSED ITS DISCRETION, AND WAS CLEARLY ERRONEOUS BY GRANTING SUMMARY JUDGMENT UPON APPELLEE'S RULE 12B MOTION TO DISMISS BY FINDING THAT THE Appellant HAD NOT STATED A CLAIM FOR FRAUDULENT MISREPRESENTATION OR NEGLIGENT MISREPRESENTATION AND BY GOING FURTHER TO FIND THAT THE EVIDENCE DID NOT SUPPORT SUCH CLAIMS WHEN IT CLEARLY DID.

The appellant sees several issues in regard to this assignment of error: A) an explication of the elements which comprise the tort of negligent misrepresentation in this State; B) the independent existence of the torts of fraudulent or negligent misrepresentation irrespective of the legal existence of the appellant's right-of-way interests; and, C) to a much lesser extent but a significant point of interest, the conceptual sufficiency of a circuit court converting a Rule 12(b) motion to dismiss to a Rule 56 motion for summary judgment, then granting the motion for summary judgment, and then dismissing the claims without prejudice. These shall be considered in turn, after a short reminder of the case below.

The Appellant alternatively and sufficiently pleaded the torts of fraudlent and neglect misrepresentation below against the City of Clarksburg. The appellant respectfully asserts that the extant evidence comprises much more than a prima facie case of both torts and, of course, believes that a trier of fact should decide for which tort(s), if either, the City should be held culpable.

The lower court appropriately ruled that Your Appellant had a right to bring both of these claims, that they were not barred by *res judicata* from the prior "sister" case of Harrison County Civil Action No.: 04-C-640-3 involving the enforcement of right-of-way interests against the City as discussed above-herein. The lower court felt that the fraudulent misrepresentation claim was not present by virtue of the fact that another division of the circuit court had found that the appellant had no valid right-of-way interests. As for the negligent misrepresentation claim, the lower court found that it could not allow the appellant to proceed on such because it had insufficient guidance from West Virginia case law as to what comprises the elements of that tort. While the lower court is correct in that legal finding and cannot be faulted therefore, it is a harsh justification for dismissing a claim which is explicitly declared to exist in our jurisprudence. By the same token, while a litigant never wishes to see its case extinguished in such a manner with the real possibility of not being able to be heard at the appellate level, it is also appreciated by the appellant that such express declarations of previously unarticulated legal elements are probably best left for this High Court to decide instead of the lower court.

A) Negligent Misrepresentation

Negligent misrepresentation is a lesser form of fraud and deceit, and is

recognized as a litigible claim in our jurisdiction in multiple published opinions of the West Virginia Supreme Court,[14] including *Kidd v. Mull*, 595 S.E.2d 308, 215 W. Va. 151 (2004); *Cordial v. Ernst & Young, 199 W. Va. 119, 483 S.E.2d 248 (1996);* and *Darrisaw v. Old Colony Realty Company*, 202 W. Va. 23, 501 S.E.2d 187 (1997).

The leading case we do have regarding this cause of action is *Kidd v. Mull*, 595 S.E.2d 308, 215 W. Va. 151 (2004). In an opinion authored by Justice Albright, the High Court does appear to reference one necessary element of the tort:

> "As both parties have correctly asserted, a successful claim for negligent misrepresentation would require a finding that Ms. Mark-was was a real estate broker and thereby maintained a special relationship or duty to the Appellants." *Kidd* at 215 W. Va. 160.

Though that reference cites *"Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728(1994)(fn11)," it was only for the purpose of showing that a special interrogatory should be submitted to a jury in such matters. Both cases involve the representations of a vendor or its agents in selling real property and the responsibilities of a vendee upon receiving and relying upon such representations. Other than that, while the case provides much clear guidance regarding fraudulent misrepresentation, there may not be much else to be gleaned specifically regarding the tort of negligent misrepresentation.

The Virginia high court has ruled that "[N]egligent misrepresentation is the essence of a claim for constructive fraud in Virginia." *Hansen v. Stanley Martin*

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[14]While a thorough search reveals the existence of the phrase "negligent misrepresentation" in thirteen case opinions, a smaller subset of those cases use the term as referencing an independent tort.

Companies, Inc. 585 S.E.2d 567, 266 Va. 345 (2003), *citing Richmond Metro. Auth. v. McDevitt St. Bovis, Inc.*, 256 Va. 553, 559, 507 S.E.2d 344, 347 (1998). While West Virginia has no explicit declaration of equality of the claims of "negligent misrepresentation" and "constructive fraud," there may be an implied equality in looking at the pertinent cases as a whole. For example, this High Court has reasoned that

> "While it is true that we did not expressly utilize fraud concepts in *Harless*, its underlying rationale is clearly compatible with our general principles of fraud. Fraud has been defined as including all acts, omissions, and concealments which involve a breach of legal duty, trust or confidence justly reposed, and which are injurious to another, or by which undue and unconscientious advantage is taken of another. *See, Dickel v. Smith*, 38 W.Va. 635, 18 S.E. 721 (1893); 8B Michie's Jurisprudence, *Fraud and Deceit §§* 1 and 2 (1977); 37 Am.Jur.2d *Fraud and Deceit* § 1 (1968).
>
> "Fraud may be either actual or constructive. The word "fraud" is a general term and construed in its broadest sense embraces both actual and constructive fraud. Actual fraud, or fraud involving guilt, is defined as anything falsely said or done to the injury of property rights of another. *Hulings v. Hulings Lumber Co.*, 38 W.Va. 351, 18 S.E. 620 (1893). Actual fraud is intentional, and consists of intentional deception to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. *Miller v. Huntington & Ohio Bridge Co.*, 123 W.Va. 320, 15 S.E.2d 687 (1941). *See also, Steele v. Steele*, 295 F.Supp. 1266 (S.D. W.Va. 1969); *Bowie v. Sorrell*, 113 F.Supp. 373 (W.D. Va. 1953).
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> "**Constructive fraud is a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests**. *Miller v. Huntington & Ohio Bridge Co.*, 123 W.Va. 320, 15 S.E.2d 687 (1941). *See also, Steele v. Steele*, 295 F.Supp. 1266 (S.D. Va. 1969); *Bowie v. Sorrell*, 113 F.Supp. 373 (W.D. Va. 1953); *Loucks v. McCormick*, 198 Kan. 351, 424 P.2d 555 (1967); *Bank v Board of Education of City of New York*, 305 N.Y. 119, 111 N.E.2d 238 (1953); *Braselton v. Nicolas & Morris*, 557 S.W.2d 187 (Tex. Civ. App. 1977).

> "Perhaps the best definition of constructive fraud is that it exists in cases in which conduct, although not actually fraudulent, ought to be so treated, that is, in which conduct is a constructive or *quasi fraud*, which has all the actual consequences and legal effects of actual fraud. *In Re Arbuckle's Estate*, 98 Cal. App.2d 562, 220 P.2d 950 (1950). Constructive fraud does not require proof of fraudulent intent. The law indulges in an assumption of fraud for the protection of valuable social interests based upon an enforced concept of confidence, both public and private.(fn4) *Perlberg v. Perlberg*, 18 Ohio St.2d 55, 247 N.E.2d 306 (1969). In this respect, constructive fraud closely parallels the wrongful discharge in *Harless*, which contravened a substantial public policy principle."

Stanley v. Sewell Coal Co., **169 W.Va. 72** 76-77, 285 S.E.2d 679, 683 (1982)(Emphasis added).

So, in this line of reasoning, this Court has declared that two species of fraud exist ("fraud may be either actual or constructive"). One involves "guilt" or moral culpability and one does not. We also know that "fraudulent misrepresentation" and "actual fraud" are the same thing, with the same elements. See Syl. Pt. 5 of *Kidd v. Mull* and *Fraud and Deceit* MJ2 § 2. Since the Supreme Court of Appeals has said that the tort of negligent misrepresentation exists, and again, since there are only two species of fraud, then perhaps constructive fraud and negligent misrepresentation must be the same tort. The *Miller v. Huntington & Ohio Bridge Co.*, 123 W.Va. 320, 15 S.E.2d 687 (1941) case states what has been consistent through time in regard to constructive fraud: that it "is a breach of a legal or equitable duty, which, irrespective of moral guilt of the fraud feasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." The facts alleged in this case

perfectly apply to these requirements. This was a government entity who made various misrepresentations regarding acquiring land for a public works project with public monies, inducing the appellant to part with said parcel. It represented that the parcel was being acquired to be used for the public parking project. It has not been. It represented that it was going to demolish the building on the parcel (which again, was extremely important to the appellant's plan for their downtown properties regarding pedestrian access). It did not demolish the building and then went so far as to maintain (even substantially into litigation until the initial letter was found referenced above) that it never intended to demolish the building. It maintained in the litigation that no right-of-way interests existed and that it never promised to be bound by the same, contrary to the clear documents of record. The chief City official maintained that he did not tell the project architect, contrary to the project architect's contemporaneous memorandum of record and testimony, that he never stated the property would not be acquired or the building demolished during the negotiations with the appellants when both such representations were being maintained to it to induce it to sell the parcel.

All of the elements of the two species of fraud are sufficiently present and alleged in the Complaint, and genuine issues of material facts regarding those elements exist such that this case should not have been the victim of summary judgment. And though there was unavoidable confusion regarding the elements of negligent misrepresentation, there is clearly enough of record for negligent misrepresentation in

the context of all of the other facts before the lower court.

The appellant's arguments regarding the City's higher standard of conduct than a commercial corporation and heightened duty of fair dealing and honesty toward its citizens set forth above-herein apply to this assignment of error as well.

B) The Independent Existence of the Torts Alleged

The two species of fraud independently alleged do not depend in any way upon the ultimate validity of the right-of-way instruments. The elements of each tort are still present. The lower court stated in its final order that it "could not fathom" how the fraud could exist if the right-of-way interests, as decided by the other Division of the circuit court, did not have legal validity. But this is about reliance upon representations and promises. The City represented it would honor those interests, which it specifically and explicitly stated. As set forth with acceptance and approval in the *Stanley* case quoted above, "[F]raud has been defined as including all acts, omissions, and concealments which involve a breach of legal duty, trust or confidence justly reposed, and which are injurious to another, or by which undue and unconscientious advantage is taken of another." *See, Dickel v. Smith*, 38 W.Va. 635, 18 S.E. 721 (1893); 8B Michie's Jurisprudence, *Fraud and Deceit §§* 1 and 2 (1977); 37 Am.Jur.2d *Fraud and Deceit* § 1 (1968). Finally, the last sentence of Syl. Pt. 6 of *Kidd* illustrates the matter:

> "Where one person induces another to enter into a contract by false representations which he is in a situation to know, and which it is his duty to know, are untrue, he, in contemplation of law, does know the statements to be

> untrue, and consequently they are held to be fraudulent, and the person injured has a remedy for the loss sustained by an action for damages. It is not indispensable to a recovery that the defendant actually knew them to be false." *citing* Syl. Pt. 1, *Horton v. Tyree*, 104 W.Va. 238, 139 S.E. 737 (1927)(Emphasis added).

The actual legal validity of the right-of-ways is not indispensable to maintaining a claim. The representations of the appellee and the reasonable reliance of the appellant are the critical issues in the analysis.

C) Granting a Rule 56 Motion Without Prejudice

In regard to the lower court granting a summary judgment motion by dismissing appellant's claims without prejudice, the appellant believes that the lower court wanted to insure that, if the High Court explicated the elements of negligent misrepresentation or other such ruling in a way which would allow the appellant to, in its contemplation, proceed upon a claim for either of these misrepresentation torts, either in this case or another, the appellant would justly be permitted to re-file its action. While the appellant may understand the just and right intention of lower court, the appellant has a procedural conceptual difficulty with that act because a summary judgment is a final judgment as to the issues and, though appealable, it is, by definition, final. A dismissal of claims without prejudice leaves the door open to re-file the exact same claims. Certainly, a circuit court can convert a Rule 12(b) motion to a Rule 56 motion as expressly stated under Rule 12 of the West Virginia Rules of Civil Procedure, but can it then dismiss the claims without prejudice? While appellant could find no particularly

relevant cases in this regard for guidance, the ruling seems to strain a straightforward and perhaps simplistic interpretation and application of the Rules. Certainly, Rule 56 does not expressly state the availability of that ruling by a trial court. Therefore, it is perhaps an incidental procedural matter, but one that certainly may deserve consideration by the Honorable High Court. The appellant therefore asserts that the order should be set aside for that ground alone.

Therefore, in considering all of these issues surrounding the appellant's claims of misrepresentation, the lower court acted erroneously and abused its discretion in depriving your appellant of significant rights by dismissing Appellant's claims. The order of the lower court should be set aside and the matter remanded for further proceedings with instructions to the honorable circuit court.

Conclusion

In conclusion, the Appellant presents meritorious claims and serious and consequential matters in West Virginia jurisprudence which need clarification by this High Court. With all sincere due respect, the appellant believes that the clarifications should include rulings:

1) That the circuit court erred and abused its discretion by finding ambiguity in the right-of-way instruments of such a character that such ambiguity gave the instruments no legal effect;

2) That the circuit court erred and abused its discretion by applying the doctrine of merger to the right-of-way instruments which gave the instruments no legal effect when superior interests of justice and equity, such as estoppel, should have been applied to effect the binding legality of the said right-of-way instruments and or interests;

3) That the circuit court erred and abused its discretion by granting summary judgment to the City finding that no genuine issues of material fact existed in regard to the appellant's claims to enforce the right-of-way instruments and or interests;

4) That the circuit court erred and abused its discretion by granting summary judgment as to both of the appellant's claims of negligent and fraudulent misrepresentation on grounds that one or either such tort was inadequately expressed in the body of West Virginia jurisprudence sufficiently to allow the appellant to proceed to trial upon the same;

5) That the circuit court erred and abused its discretion by reasoning that the existence of fraudulent misrepresentation was dependent upon the actual sufficient legal interest of the right-of-ways by relying upon another judge's determination that such interests were not legally valid; and

6) That the circuit court erred abused its discretion by converting a Rule 12 motion to dismiss to a Rule 56 motion for summary judgment and then granting a dismissal without prejudice.

PRAYER FOR RELIEF

WHEREFORE, your Appellant respectfully requests that its appeal be found meritorious by this High Court, that the particular rulings of the lower courts be reversed, that the matters be remanded and allowed to proceed to trial upon their merits, and in any event, for whatsoever other relief may be necessary.

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